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June 15, 2015

VIA email only at AmandaPrice@house.mi.gov and APrice@house.mi.gov

Rep. Amanda Price
Mi. State Representative, District 89
N1193 House Office Bldg
124 N Capitol Ave
Lansing MI 48909

Re: Hearings on SB-103 (S-4)

Dear Representative Price:

Representative Adam Zemke has asked my legal opinion regarding possible amendments to SB-103 (S-4) currently pending before your committee. The proposed three amendments (attached and labeled 1 through 3) are intended to provide some minimum quality standards to ensure that teacher and administrator evaluation tools provide meaningful and reliable feedback to those evaluated. Rep. Zemke's specific question to me was whether or not the language in the proposed amendments runs afoul of the "arbitrary and capricious" standard of review contained in the Michigan Teacher Tenure Act, MCL 38.71 *et. seq.*

Before I answer that question, I believe it would be appropriate to briefly tell you who I am. I am a member in good standing with the State Bar of Michigan and have been since 1976 (UofM '76). I have a son who was educated in Michigan's public school system (Chelsea School District) and who is currently a student at the University of Michigan. I was elected to the Chelsea School District Board of Education in 2004 and continue to serve in that capacity. Incidentally, the Grand Haven Area Public Schools has, just this past month, hired our Superintendent, Andrew Ingall, as Grand Haven's new Superintendent of Schools beginning July 1, 2015. I have also served on the Washtenaw Association of School Boards as a board member. This past September, Governor Snyder appointed me to the position of commissioner on the State Tenure Commission as a member of a board of education of a graded or city school district. I do want to make clear that I am not speaking for or on behalf of the State Tenure Commission. Although my past legal practice would not qualify me to claim I am a "tenure attorney," I believe that my background, experience and interest has made me competent concerning the topic at issue and can render an opinion as requested by Rep. Zemke.

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The "arbitrary and capricious" standard of review for tenured teacher discharges or demotions was adopted by the Legislature in 2011. The relevant statutory language states, in part:

[D]ischarge or demotion of a teacher on continuing tenure may be made only for a reason that is not arbitrary or capricious and only as provided in this act. [MCL 38.101.]

The Michigan Supreme Court defined the words "arbitrary" and "capricious" in *Bundo v Walled Lake*, 395 Mich 679, 703, n.. 17; 238 NW2d 154 (1976), citing the United States Supreme Court in *United States v Carmack*, 329 US 230, 243; 67 S.Ct. 252, 258; 91 L.Ed. 209 (1946); *Brandon School District v Michigan Educ. Special Services Assn*, 191 Mich App 257; 477 NW2d 138 (1991):

Arbitrary is " '[W]ithout adequate determining principle . . . fixed or arrived at through an exercise of will or by caprice, without consideration of adjustment with reference to principles, circumstances, or significance, . . . decisive but unreasoned.' "

Capricious is " '[A]pt to change suddenly; freakish; whimsical; humorsome.' "

The "arbitrary and capricious" standard in the Teacher Tenure Act is a standard of review used to measure the behavior of a local education agency (LEA) in cases of discharge or demotion of a tenured teacher. It is not a standard of review of the validity of teacher evaluation legislation itself.

The establishment of minimum quality standards for teacher and administrator evaluations in legislation that requires a LEA to evaluate teachers and administrators should provide LEAs with evaluation tools or a framework for developing evaluation tools against which claims of arbitrariness and capriciousness would be measured. That is, the Legislature, by specifying or recommending particular evaluation tools, or specifying that certain minimum quality standards (such as those found in the 2013 final recommendations of the Michigan Council for Educator Effectiveness) be used if a recommended evaluation tool were to be modified by a LEA, or commanding that if a LEA developed its own evaluation tool, it must provide evidence of reliability, validity and efficacy of the evaluation tool, protects the LEA from claims of arbitrariness and capriciousness in tenure litigation if the legislatively defined tools, standards and processes are properly used by the LEA.

In this way, the Legislature, not a court, defines what the proper process would be for evaluating tenured teachers and whether a LEA acted arbitrarily and capriciously in determining if a tenured teacher should be discharged or demoted. If the legislatively prescribed process is properly followed by a LEA, then the discharge or demotion of a tenured teacher could not legally be found to be "arbitrary and capricious."

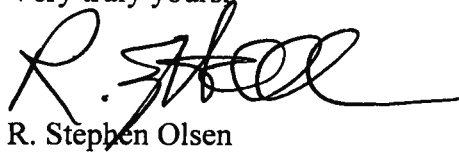
Accordingly, none of the three proposed amendments to SB-103 run afoul of the "arbitrary and capricious" standard in the Teacher Tenure Act. If I were asked which of the three proposed amendments I believed was the strongest against legal attack, I would pick number 1. It provides

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LEAs with the most direction and still allows a LEA to develop its own evaluation tool if it so desired.

I hope you will find this opinion helpful in your deliberations.

Very truly yours,

A handwritten signature in black ink, appearing to read "R. Olsen", with a long horizontal flourish extending to the right.

R. Stephen Olsen

Enc.

cc: Representative Adam Zemke via email only at Azemke@house.mi.gov

NUMBER 1

_____ offered the following amendment to Senate Bill
No. 103 (S-4):

1. Amend page 8, line 14, after "YEAR," by inserting "THE SCHOOL DISTRICT, INTERMEDIATE SCHOOL DISTRICT, OR PUBLIC SCHOOL ACADEMY MUST ADOPT 1 OF THE EVALUATION TOOLS ON THE LIST MAINTAINED BY THE DEPARTMENT OF TECHNOLOGY, MANAGEMENT, AND BUDGET UNDER SUBSECTION (6) OR AN ADAPTATION OR MODIFICATION OF 1 OF THOSE EVALUATION TOOLS THAT DOES NOT COMPROMISED THE VALIDITY OF EITHER THE EVALUATION TOOL OR THE EVALUATION PROCESS AND HAVE UNDERGONE REVIEW BY A PERSON WITH EXPERTISE IN TEACHER EVALUATIONS. A SCHOOL DISTRICT, INTERMEDIATE SCHOOL DISTRICT, OR PUBLIC SCHOOL ACADEMY MAY ALSO FULFILL THIS REQUIREMENT BY ADOPTING ANOTHER EVALUATION TOOL THAT MEETS THE CRITERIA ESTABLISHED IN THE FINAL RECOMMENDATIONS RELEASED BY THE MICHIGAN COUNCIL FOR EDUCATOR EFFECTIVENESS IN JULY 2013 FOR DETERMINING THE QUALITY AND RIGOR OF ALTERNATIVE EVALUATION SYSTEMS, OR BY DEVELOPING ANOTHER EVALUATION TOOL IF THE SCHOOL DISTRICT, INTERMEDIATE SCHOOL DISTRICT, OR PUBLIC SCHOOL ACADEMY CAN PROVIDE EVIDENCE OF RELIABILITY, VALIDITY, AND EFFICACY OF THE EVALUATION TOOL OR A PLAN FOR DEVELOPING THAT EVIDENCE."

2. Amend page 20, line 25, after "DIRECTORS." by inserting "THE SCHOOL DISTRICT, INTERMEDIATE SCHOOL DISTRICT, OR PUBLIC SCHOOL ACADEMY MUST ADOPT 1 OF THE EVALUATION TOOLS ON THE LIST MAINTAINED BY THE DEPARTMENT OF TECHNOLOGY, MANAGEMENT, AND BUDGET UNDER SUBSECTION (4) OR AN ADAPTATION OR MODIFICATION OF 1 OF THOSE EVALUATION TOOLS THAT DOES NOT COMPROMISED THE VALIDITY OF EITHER THE EVALUATION TOOL OR THE EVALUATION PROCESS AND HAVE UNDERGONE REVIEW BY A PERSON WITH EXPERTISE IN ADMINISTRATOR EVALUATIONS. A SCHOOL DISTRICT, INTERMEDIATE SCHOOL DISTRICT, OR PUBLIC SCHOOL ACADEMY MAY ALSO FULFILL THIS REQUIREMENT BY ADOPTING ANOTHER EVALUATION TOOL THAT MEETS THE CRITERIA ESTABLISHED IN THE FINAL RECOMMENDATIONS RELEASED BY THE MICHIGAN COUNCIL FOR EDUCATOR EFFECTIVENESS IN JULY 2013 FOR DETERMINING THE QUALITY AND RIGOR OF ALTERNATIVE EVALUATION SYSTEMS, OR BY DEVELOPING ANOTHER EVALUATION TOOL IF THE SCHOOL DISTRICT, INTERMEDIATE SCHOOL DISTRICT, OR PUBLIC SCHOOL ACADEMY CAN PROVIDE EVIDENCE OF RELIABILITY, VALIDITY, AND EFFICACY OF THE EVALUATION TOOL OR A PLAN FOR DEVELOPING THAT EVIDENCE."

NUMBER 2

_____ offered the following amendment to Senate Bill No. 103 (S-4):

1. Amend page 19, after line 8, by inserting "(8) IN ADDITION TO THE REQUIREMENTS OF SUBSECTION (4), IF A SCHOOL DISTRICT, INTERMEDIATE SCHOOL DISTRICT, OR PUBLIC SCHOOL ACADEMY DEVELOPS OR ADOPTS AND IMPLEMENTS AN EVALUATION TOOL FOR TEACHERS THAT IS NOT INCLUDED ON THE LIST OF TOOLS MAINTAINED BY THE DEPARTMENT OF TECHNOLOGY, MANAGEMENT, AND BUDGET AS PROVIDED IN SUBSECTION (6), THE SCHOOL DISTRICT, INTERMEDIATE SCHOOL DISTRICT, OR PUBLIC SCHOOL ACADEMY SHALL POST ON ITS PUBLIC WEBSITE ALL OF THE FOLLOWING:

(A) AN ASSURANCE THAT THE EVALUATION TOOL OR TOOLS USED BY THE SCHOOL DISTRICT, INTERMEDIATE SCHOOL DISTRICT, OR PUBLIC SCHOOL ACADEMY ARE RESEARCH BASED.

(B) AN ASSURANCE THAT THE EVALUATION TOOL OR TOOLS USED BY THE SCHOOL DISTRICT, INTERMEDIATE SCHOOL DISTRICT, OR PUBLIC SCHOOL ACADEMY WERE DEVELOPED BY A PERSON OR PERSONS WITH EXPERTISE IN TEACHER EVALUATIONS.

(C) AN ASSURANCE THAT THE EVALUATION TOOL OR TOOLS USED BY THE SCHOOL DISTRICT, INTERMEDIATE SCHOOL DISTRICT, OR PUBLIC SCHOOL ACADEMY CAN DEMONSTRATE EVIDENCE OF RELIABILITY, VALIDITY AND EFFICACY, OR AN ASSURANCE THAT THE DISTRICT IS ACTIVELY COLLECTING EVIDENCE IN ORDER TO DETERMINE THE RELIABILITY, VALIDITY, AND EFFICACY ITS EVALUATION TOOL OR TOOLS."

2. Amend page 25, after line 23 by inserting "(5) IN ADDITION TO THE REQUIREMENTS OF SUBSECTION (3), IF A SCHOOL DISTRICT, INTERMEDIATE SCHOOL DISTRICT, OR PUBLIC SCHOOL ACADEMY DEVELOPS OR ADOPTS AND IMPLEMENTS AN EVALUATION TOOL FOR SCHOOL ADMINISTRATORS THAT IS NOT INCLUDED ON THE LIST OF TOOLS MAINTAINED BY THE DEPARTMENT OF TECHNOLOGY, MANAGEMENT, AND BUDGET AS PROVIDED IN SUBSECTION (4), THE SCHOOL DISTRICT, INTERMEDIATE SCHOOL DISTRICT, OR PUBLIC SCHOOL ACADEMY SHALL POST ON ITS PUBLIC WEBSITE ALL OF THE FOLLOWING:

(A) AN ASSURANCE THAT THE EVALUATION TOOL OR TOOLS USED BY THE SCHOOL DISTRICT, INTERMEDIATE SCHOOL DISTRICT, OR PUBLIC SCHOOL ACADEMY ARE RESEARCH BASED.

(B) AN ASSURANCE THAT THE EVALUATION TOOL OR TOOLS USED BY THE SCHOOL DISTRICT, INTERMEDIATE SCHOOL DISTRICT, OR PUBLIC SCHOOL ACADEMY WERE DEVELOPED BY A PERSON OR PERSONS WITH EXPERTISE IN ADMINISTRATOR EVALUATIONS.

(C) AN ASSURANCE THAT THE EVALUATION TOOL OR TOOLS USED BY THE SCHOOL DISTRICT, INTERMEDIATE SCHOOL DISTRICT, OR PUBLIC SCHOOL ACADEMY CAN DEMONSTRATE EVIDENCE OF RELIABILITY, VALIDITY AND EFFICACY, OR AN ASSURANCE THAT THE DISTRICT IS ACTIVELY

COLLECTING EVIDENCE IN ORDER TO DETERMINE THE RELIABILITY,
VALIDITY, AND EFFICACY ITS EVALUATION TOOL OR TOOLS."

NUMBER 3

Senator _____ offered the following amendments to Senate Bill No. 103 (S-4):

1. Amend page 8, line 14, after "YEAR," by striking out "THE" and inserting "A SCHOOL DISTRICT, INTERMEDIATE SCHOOL DISTRICT, OR PUBLIC SCHOOL ACADEMY SHALL ENSURE THAT ITS EVALUATION TOOL OR TOOLS FOR TEACHERS MEET ALL OF THE FOLLOWING:

(i) ARE DESIGNED, TESTED, AND CALIBRATED USING EMPIRICAL RESEARCH ON EFFECTIVE PEDAGOGY PRACTICE AND STUDENT LEARNING.

(ii) ARE DEVELOPED BY AUTHORS WITH EXPERTISE IN EVALUATING TEACHERS. ANY LOCAL ADAPTATION OR MODIFICATION OF AN EVALUATION TOOL OR TOOLS MUST ALSO BE DEVELOPED BY AUTHORS WITH EXPERTISE IN EVALUATING TEACHERS.

(iii) THERE IS DEMONSTRATED EVIDENCE OF RELIABILITY, VALIDITY, AND EFFICACY OR A PLAN IN PLACE FOR COLLECTING THAT EVIDENCE.

(G) THE" and relettering the remaining subdivisions.

2. Amend page 20, line 25, after "DIRECTORS." by inserting "A SCHOOL DISTRICT, INTERMEDIATE SCHOOL DISTRICT, OR PUBLIC SCHOOL ACADEMY SHALL ENSURE THAT ITS EVALUATION TOOL OR TOOLS FOR SCHOOL ADMINISTRATORS MEET ALL OF THE FOLLOWING:

(i) ARE DESIGNED, TESTED, AND CALIBRATED USING EMPIRICAL RESEARCH ON EFFECTIVE ADMINISTRATIVE PRACTICE AND STUDENT LEARNING.

(ii) ARE DEVELOPED BY AUTHORS WITH EXPERTISE IN EVALUATING SCHOOL ADMINISTRATORS. ANY LOCAL ADAPTATION OR MODIFICATION OF AN EVALUATION TOOL OR TOOLS MUST ALSO BE DEVELOPED BY AUTHORS WITH EXPERTISE IN EVALUATING SCHOOL ADMINISTRATORS.

(iii) THERE IS DEMONSTRATED EVIDENCE OF RELIABILITY, VALIDITY, AND EFFICACY OR A PLAN IN PLACE FOR COLLECTING THAT EVIDENCE."